No. 88-916

Supreme Court, U.S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

WINSTON A. MITCHELL, M.D.;
WINSTON A. MITCHELL, M.D., INC.,
Petitioners,

VS.

FRANK R. HOWARD MEMORIAL HOSPITAL;
ROBERT HARRAH;
STEVEN WENTWORTH, M.D.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a hospital which (i) receives a substantial portion of its $5,000,000 annual revenue from out-of-state public and private insurance programs (including federally subsidized programs); (ii) purchases an unknown amount of medical supplies and equipment from out-of-state sources; and (iii) has an unknown number of out-of-state patients, sufficiently affect interstate commerce to permit a federal court to assume jurisdiction under the Sherman Act?

2. Can it be said, *as a matter of law*, that a hospital which receives a substantial portion of its $5,000,000 annual revenue from out-of-state public and private insurance programs (including federally subsidized programs) does not affect interstate commerce so that a summary judgment can be entered dismissing a Sherman Act claim *before* discovery is permitted to determine (i) the amount of medical supplies and equipment purchased from out-of-state sources, and (ii) the number and dollar volume of patients from out-of-state?

3. Assuming, *arguendo*, a small, rural hospital which receives a substantial portion of its $5,000,000 annual revenues from out-of-state sources, treats no out-of-state patients and purchases a minimal amount of supplies from out-of-state; do these facts, as a matter of law, divest the federal courts of jurisdiction under the Sherman Act?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were petitioner Winston A. Mitchell, M.D., Winston A. Mitchell, M.D., Inc. and respondents Frank R. Howard Memorial Hospital, Robert Harrah and Steven Wentworth, M.D. Petitioner Winston A. Mitchell, M.D., Inc. is a professional corporation and has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES AND RULE 28.1 LIST	ii
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	7
I.	
The Ninth Circuit's Decision That A Rural Hospital Cannot Invoke Sherman Act Jurisdiction Because It Does Not Treat Out Of State Patients, Irrespective Of The Amount Of Interstate Funding Of Local Patient Care And Interstate Purchase Of Supplies And Equipment, Furthers The Already Rampant Uncertainty Among District And Circuit Courts As To The Threshold Necessary In Hospital Antitrust Cases To Invoke Sherman Act Jurisdiction	7
II.	
The District Court's Refusal To Permit Discovery As To The Level Of Out Of State Purchases Of Supplies And Equipment And Its Refusal To Permit Discovery As To The Actual Volume Of Out Of State Patients Resulted In An Improper Grant Of Summary Judgment. The Ninth Circuit's Decision To Affirm The District Court's Action Is An Error of Law, And In Conflict With The Decisions Of This Court And Other Circuits	16
CONCLUSION	17

INDEX FOR APPENDIX

APPENDIX A

Opinion From The United States Court Of Appeal For The Ninth Circuit 1a

APPENDIX B

Decision Of The United States District Court For The Northern District of California 1b

TABLE OF AUTHORITIES

Cases

	Page
AAMCO Automatic Transmissions, Inc. v. Taylor [1975-2 TRADE CASES Para. 60,666], 407 F.Supp. 430 (E.D.Pa. 1976)	12
Apex Hosiery Co. v. Leader, 310 U.S. 469	11
Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982)	13
Bell v. Cherokee Aviation Corp. [1981-2 TRADE CASES Para. 64,318] 600 F.2d 1123 (6th Cir. 1981)	12
Capitol Industries EMI, Inc. v. Bennett, 681 F.2d 1107 (9th Cir.) *cert. den.,* 103 S.Ct. 570 (1982)	15
Crane v. Intermountain Health Care, Inc., 637 F.2d 715 (10th Cir. 1980)	8
Doctors' Inc. v. Blue Cross of Greater Philadelphia, 490 F.2d 48 (3rd Cir. 1973)	9, 16
Doe v. St. Joseph Hospital, 788 F.2d 411 (7th Cir. 1986)	8
Englert v. City of McKeesport, 736 F.2d 96 (3rd Cir. 1984)	10
Feminist Women's Health Center v. Mohammad, 586 F.2d 530 (5th Cir. 1978), *cert. den.* 444 U.S. 924	8, 9
Fortner Enterprises, Inc. v. U.S. Steel Corp., 394 U.S. 495 (1969)	15
Hayden v. Bracy, 744 F.2d 1338 (8th Cir. 1984)	8
Hospital Building Co. v. Rex Hospital Trustees, 425 U.S. 738 (1976)	15
J.P. Mascaro & Sons, Inc. v. William J. O'Hara, Inc., 565 F.2d 264 (3rd Cir. 1977)	10, 14

TABLE OF AUTHORITIES

CASES

Page

Katzenbach v. McClung, 390 U.S. 194 (1964) 8, 14

McLain v. Real Estate Board of New Orleans, 444 U.S. 232 (1980) 15

Microbyte Corp. v. New Jersey State Golf Ass'n. [1986-2 TRADE CASES Para. 67,228], 55 U.S.L.W. 2078 (D.N.J. June 26, 1986) 12

Mishler v. St. Anthony's Hospital Systems, 694 F.2d 1225 (10th Cir. 1981) 8

Palmer v. Roosevelt Lake Log Owners Assn., Inc., 651 F.2d 1289 (9th Cir. 1981) 10

Perrytown Wholesale, Inc. v. Pioneer Distributing Company, 353 F.2d 618 (10th Cir. 1965) 11

Ringtown Wilbert Vault Works v. Schuylkill Memorial Park, CCH 1987-1 Trade Cases, Para. 67,454 (E.D.Penn. 1986) 12

Tarleton v. Meharry Medical College, 717 F.2d 1523 (6th Cir. 1983) 8, 10

The Loan Store, Inc. v. Independent Food Stamps Associates, 671 F.Supp. 844 (D. C. Mass. 1987) 14, 15

Union Carbide and Carbon Corporation v. Nisley, 300 F.2d 561 (10th Cir. 1961) 11

United States v. Yellow Cab Co., 332 U.S. 218 (1947) 11

Western Waste Service Systems v. Universal Waste Control, 616 F.2d 1094 (9th Cir.) *cert. den.*, 449 U.S. 869 (1980) 10

TABLE OF AUTHORITIES

Statutes

	Page
Sherman Act, 15 U.S.C., Secs. 15 and 26	2
United States Code, Title 28,	
Sec. 1254(1)	2
Sec. 1331	2
United States Code, Title 42,	
Sec. 2000e-5(f)(3)	2
Sec. 12001-12032	16

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Winston A. Mitchell, M.D. and Winston A. Mitchell, M.D., Inc. respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on August 9, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 853 F.2d 762 and is reprinted in the appendix hereto as Appendix A.

The memorandum decision of the United States District Court for the Northern District of California

(Vukasin, D.J.) has not been reported. It is reprinted in the appendix hereto as Appendix B.

JURISDICTION

Invoking federal jurisdiction under 15 U.S.C. Section 15 and Section 26 and 42 U.S.C. Section 2000e-5(f)(3) and 28 U.S.C. Section 1331, the petitioners brought this suit in the Northern District of California. On April 21, 1987, the Northern District granted respondents' motions for summary judgment upon the Sherman Act and Title VII claims.

On petitioners' appeal, the Ninth Circuit on August 9, 1988, entered a judgment and an opinion affirming the Northern District's order of summary judgment with respect to the Sherman Act claims and reversed the Northern District's order respecting the Title VII claim. It is the grant of summary judgment against petitioner as to the Sherman Act claims which forms the basis of this petition. No petition for rehearing was sought.

On October 28, 1988, Justice O'Connor ordered that the time for filing this petition for Writ of Certiorari be extended to and including November 28, 1988.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This Petition involves the Sherman Act; 15 U.S.C. Sections 15 and 26.

STATEMENT OF THE CASE

Petitioner is a highly competent radiologist and nationally recognized authority in cardiovascular radiology.

From 1971 to 1980, he was a member of the medical staff of Loma Linda University. In April, 1980, respondents Howard Hospital and Robert Harrah induced petitioner to leave Loma Linda University and relocate his practice and family in Willits, California, a small rural community located north of San Francisco. Respondent hospital is the only hospital in Willits, California but has had annual revenues in excess of $5,000,000 per year since 1980. Over 40% of these funds come from the Medicare program and approximately 11% from the Medi-Cal program, funded in part by Medicaid, a federal subsidy program. A significant, but as yet unquantified, portion of the balance of the hospital's revenues come from insurance companies, many of which are located outside of the State of California. The radiology department itself has generated revenues in excess of $600,000 per year with the sources of revenues being similar to that of the hospital. On a yearly basis the hospital has purchased approximately $600,000 in supplies and equipment. It has not yet been determined what portion of those supplies or that equipment originates from outside the State of California. It is undisputed that the hospital treats few patients from outside the State of California, but the exact number of them and the dollar value generated thereby is in dispute. The Hospital contends that it is "zero percent", *i.e.* less than one percent, which could reflect up to $50,000 per year in out of state revenue. Petitioner sought discovery to determine the exact number, but such discovery was denied.

In 1985, petitioner was ousted from the medical staff of the hospital which, being the only one in the area, has prohibited petitioner from practicing his profession and forced he and his family to move from the area. This ouster is alleged to have occurred because petitioner refused to enter into a contract with the hospital which

would have been illegal because it would have resulted in an improper split of professional fees between petitioner and the hospital and it would have given the hospital unlawful control over the petitioner's medical judgment in his treatment of patients. It is also alleged that respondents decided to terminate petitioner's relationship with the hospital because they disapproved of his Mormon religious practices.

The original complaint in this action was filed in October of 1986 setting forth only the antitrust and pendent state claims. The religious discrimination claim was not included at that time because plaintiffs had not exhausted their administrative remedies. In November, 1986, prior to the filing of responsive pleadings, petitioner filed a First Amended Complaint setting forth the religious discrimination claim.

In January, 1987 respondents filed motions to dismiss and for summary adjudication and on February 19, 1987 the District Court granted the motion for summary judgment on the antitrust claims at oral argument and took the motion to dismiss the religious discrimination and pendent state claims under submission until March 4, 1987 at which time it entered an order granting the motion for summary judgment on antitrust claims, dismissing the religious discrimination claims and dismissing all pendent claims. A timely motion for reconsideration was brought and granted. Without the ability to conduct additional discovery, additional evidence was submitted by both parties, considered by the Court and on April 21, 1987, the motion for summary judgment was once again granted.

A timely appeal was taken before the Ninth Circuit which ultimately affirmed the grant of summary judgment as to the antitrust issues and reversed summary judg-

ment on the religious discrimination issue. It is from the final determination on the antitrust issues that petitioner requests certiorari.

The Ninth Circuit acknowledged that a substantial portion of the hospital's annual revenues came from out of state public and private insurance programs including federally subsidized programs and that petitioner's department itself generated in excess of $600,000 a year in revenue. The Ninth Circuit also noted that an unknown amount of medical supplies and equipment originates from out of state sources. However, the Ninth Circuit was incorrect when it concluded that it was undisputed that the hospital treated no out of state patients.

Both the District Court and the Ninth Circuit rejected the petitioner's argument that substantial, *i.e.* perhaps as much as $5,000,000.00 per year, activity in *one line* of commerce (interstate flow of payment funds) is enough to establish Sherman Act jurisdiction. Instead, as demonstrated by the key language from the Ninth Circuit's opinion, both the lower courts erroneously concluded that because the business involved in this case was a hospital, multiple lines of interstate commerce must be established:

> "[A]s the district court observed, 'determinations of [Sherman Act] jurisdiction [in hospital cases] are based not merely upon revenue figures, but on a broad aggregate of factors including proximity of the facility to regional centers of commerce or to other states, treatment of significant numbers of out of state patients, purchase of equipment and supplies from interstate sources and interstate transfer of payment for patient care.' (Citation omitted)
>
> We agree with the District Court that these factors weigh against finding Sherman Act jurisdiction here.

> The small defendant hospital is located in a remote area of northern California over 150 miles from either the Oregon or Nevada borders and over 100 miles from the nearest significant urban center, San Francisco. According to the uncontroverted evidence in the record, the Hospital has not provided medical services for even one out of state patient at least since 1983. (Footnote omitted) The mere fact that this small hospital receives some out of state insurance payments and may have purchased some supplies from out of state sources does not amount to a showing that as a matter of practical economics the hospital's activities have a not insubstantial effect on any interstate commerce. (Footnote omitted)"[1]

The Ninth Circuit, after noting the existence of disputes amongst District and Circuit Courts of Appeal as to

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[1]In a footnote to this reasoning, the Ninth Circuit notes, but rejects petitioners' allegation that the hospital purchases an unknown quantity of supplies out of state, as well as petitioners' explanation that without further discovery he cannot ascertain the precise amount.

> "We do not feel that further discovery on this point could produce evidence that would change our conclusion that this rural California hospital's activities do not affect any aspect of interstate commerce sufficient to trigger Sherman Act jurisdiction."

Additionally, petitioners take exception to the Ninth Circuit's characterization of the affidavit of the hospital's administrator upon which the courts below based their conclusion that there were no out of state patients. The affidavit contained no information for the years 1984 and 1985 and merely stated that "zero percent" of the revenue for 1986 came from out of state patients. The term "zero percent" may not mean no revenue, but less than 1% ($50,000). It is on this issue, as well as that of quantifying the out of state supplies and equipment purchases that petitioners had asked for the ability to conduct discovery prior to the entry of an order granting summary judgment.

the determination of hospital impact on interstate commerce stated in a conclusionary manner "our canvasing of the hospital cases supports our judgment that Dr. Mitchell has failed to make a showing sufficient to establish Sherman Act jurisdiction. The cases in which the Courts have found Sherman Act jurisdiction involve hospitals whose activities appear to have had a much greater effect on interstate commerce than the activities of the hospital in this case."

Petitioners seek this Court's review of the District Court and Ninth Circuit's apparent determination that a *rural* hospital, without a significant number of out of state patients, (irrespective of (i) the volume of out of state funds used to pay for patient costs; and (ii) what facts might be developed to show the out of state purchase of supplies and equipment) cannot, as an apparent matter of law, invoke federal jurisdiction under the Sherman Act.

REASONS FOR GRANTING THE WRIT

I.

The Ninth Circuit's Decision That A Rural Hospital Cannot Invoke Sherman Act Jurisdiction Because It Does Not Treat Out Of State Patients, Irrespective Of The Amount Of Interstate Funding Of Local Patient Care And Interstate Purchase Of Supplies And Equipment, Furthers The Already Rampant Uncertainty Among District And Circuit Courts As To The Threshold Necessary In Hospital Antitrust Cases To Invoke Sherman Act Jurisdiction

In prosecuting this case and similar cases, petitioners' counsel has been repeatedly struck with the inability of counsel, District Courts and Circuit Courts to determine the factors, and level of involvement for each of those

factors, necessary to invoke Sherman Act jurisdiction with regard to interstate commerce.

As the Ninth Circuit points out in its opinion below, the presence of interstate funds to pay for local patient care, the purchase of medical supplies from out of state, the treatment of some number of out of state patients, the recruiting of faculty from other states and similar factors have resulted in a split amongst the circuits as to whether and to what extent jurisdiction under Sherman Act can be invoked. *Compare e.g. Mishler v. St. Anthony's Hospital Systems,* 694 F.2d 1225 (10th Cir. 1981), *Tarleton v. Meharry Medical College,* 717 F.2d 1523 (6th Cir. 1983), *Crane v. Intermountain Health Care, Inc.,* 637 F.2d 715 (10th Cir. 1980) (enbanc) with *Doe v. St. Joseph Hospital,* 788 F.2d 411 (7th Cir. 1986), *Hayden v. Bracy,* 744 F.2d 1338, 1342-43 (8th Cir. 1984), all cited by the Ninth Circuit in its decision in this case. The only distinguishing feature between these five cases is the several Courts' seemingly subjective determination as to whether otherwise similar facts have met the courts' apparent "gut reaction" as to whether sufficient interstate activity has occurred to warrant federal jurisdiction.

Indeed, the briefs of the parties to this action contain citations to no less than 40 federal court decisions, nearly evenly split, involving similar facts with varying levels of financial involvement, without providing a reasonable road map to litigants, their counsel or the courts as to the manner of weighing each factor to determine whether jurisdiction is appropriate.

Some of the cases cited involve dollar values significantly less than present in this case (see, e.g. *Katzenbach v. McClung,* 390 U.S. 194 (1964), a non-hospital case involving the purchase of approximately $70,000 of supplies from out of state sources; *Feminist Women's Health*

Center v. Mohammad, 586 F.2d 530, 539-41 (5th Cir. 1978), *cert. den.* 444 U.S. 924, $4,000 worth of out of state supplies and $10,000 worth of yearly revenue from out of state patients and *Doctors' Inc. v. Blue Cross of Greater Philadelphia*, 490 F.2d 48 (3rd Cir. 1973), jurisdiction found on the basis of a single line of commerce, the purchase of $200,000 per year of interstate supplies.

Additionally, the Ninth Circuit's opinion appears to stand for the proposition that a rural hospital, simply because it is rural and not located near a state border cannot, as a matter of law, meet the interstate commerce jurisdictional requirement of the Sherman Act despite its level of receipt of interstate funds from commercial insurers or the federal/medical reimbursement programs, its dollar volume of purchase of out of state equipment and supplies (although unknown in this case) or treatment of out of state patients, albeit constituting less than 1% of its gross revenues.

Petitioners have contended below that a single line of commerce, here the flow of interstate funds for reimbursement of patient care, is sufficient to invoke federal jurisdiction. Petitioners respectfully suggest that if the industry involved in this matter was other than health care, the receipt of funds from interstate sources for payment for goods and services by a business catering otherwise to individuals residing predominantly within a single state would nevertheless be thought sufficient to invoke federal jurisdiction.

Indeed, in reaching its decision in this case, the Ninth Circuit had to ignore and/or distinguish a long line of cases, in its own Circuit as well as others, where jurisdiction was founded on *one line* of commerce and/or dollar amounts in a few lines far smaller than Howard Hospital's $5,000,000.00 in out of state revenues.

The Ninth Circuit's opinion did attempt to distinguish its earlier opinion in *Palmer v. Roosevelt Lake Log Owners Assn., Inc.* 651 F.2d 1289 (9th Cir. 1981) ($35,000 per year in the log salvaging business). But the opinion ignored many other cases which found jurisdiction based upon a not insubstantial effect on one line of commerce. For example, in *Western Waste Service Systems v. Universal Waste Control*, 616 F.2d 1094 (9th Cir.) *cert. den.*, 449 U.S. 869 (1980), the defendants engaged in the garbage collection industry and had total interstate business of approximately $200,000.00 a year, while the plaintiff spent only about $100,000.00 per year for out of state equipment. In *J.P. Mascaro & Sons, Inc. v. William J. O'Hara, Inc.*, 565 F.2d 264 (3rd Cir. 1977), jurisdiction was based upon $62,000.00 a year of out of state equipment and supply purchases; $11,000.00 per year of out of state insurance premiums; $50,000.00 per year of payments on out of state loans; and $22,000.00 a year of payments from out of state customers. *See also, Tarleton v. Meharry Medical College, supra*, 717 F.2d 1523 at 1528 (jurisdiction with less than 5% out of state patients and $1,000,000.00 in total fees in the allegedly illegal medical practice plan fund). In *Englert v. City of McKeesport*, 736 F.2d 96 (3rd Cir. 1984), federal jurisdiction was upheld based upon an allegedly illegal exclusive contract for inspection of electrical work in buildings in the small city of McKeesport, Pennsylvania. Although no specific numbers are discussed in the case, it is highly doubtful that electrical work in new construction in such a small city could have been anywhere near the $5,000,000.00 in gross revenues of Howard Hospital.

See also, Perrytown Wholesale, Inc. v. Pioneer Distributing Company, 353 F.2d 618 (10th Cir. 1965):

> "Perrytown urges that the impact on interstate commerce is not substantial enough to invoke the application of the federal antitrust laws. The court found a total loss of profits because of the conspiracy in the amount of $13,140.96, of which $1,938.31 arose from Colorado operations. Damages because of loss of fixtures and merchandise was fixed at $4,146.21, of which $652 occurred in Colorado. Pioneer was a Kansas based firm distributing out of a Wichita warehouse in which the goods came to rest. The argument is that the only effect on interstate commerce is that reflected by the business done in Colorado.
>
> In *United States v. Yellow Cab Co.*, 332 U.S. 218, 225, and in *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 485, the Supreme Court said a Section 1 Sherman Act violation is determined by the nature of the restraint and not by the amount of commerce affected. In *Union Carbide and Carbon Corporation v. Nisley*, 10 Cir. 300 F.2d 561, 585, certiorari dismissed sub nom. 371 U.S. 801, we said that Section 1 condemns unreasonable restraint 'irrespective of the amount of trade or commerce involved.' As we have shown the restraint is unreasonable. That vice is not removed by the low dollar amount of the damages resulting from loss of interstate trade."

See also, Ringtown Wilbert Vault Works v. Schuylkill Memorial Park, CCH 1987-1 Trade Cases, Para 67,454 (E.D.Penn. 1986) ($6,000 per year of materials from interstate commerce aggregating to $100,000 over the length of the illegal activity):

> "There is no simple benchmark by which I may determine whether this is a not insubstantial effect on interstate commerce. It is appropriate to consider the aggregate effect over the duration of the violation. The effect of a one shot transaction is quite different from that of an ongoing practice. However, the figure is meaningless unless it is viewed in the context of a time frame. Thus, the cases the court has reviewed have consistently stated the aggregate amount in that context. None of those cases has held an annual dollar amount of $6,000 to be 'substantial.' On the other hand, none of them has considered a tying arrangement which has continued for so long a period. *See Bell v. Cherokee Aviation Corp.* [1981-2 TRADE CASES Para. 64,318], 600 F.2d 1123, 1130 (6th Cir. 1981) ($140,000 over three years not insubstantial); *Microbyte Corp. v. New Jersey State Golf Ass'n.* [1986-2 TRADE CASES Para. 67,228], 55 U.S.L.W. 2078 (D.N.J. June 26, 1986) ($27,264 in one year is not *de minimis*); *AAMCO Automatic Transmissions, Inc. v. Taylor* [1975-2 TRADE CASES Para. 60,666], 407 F.Supp. 430, 436 (E.D.Pa. 1976) ($50,000 over four years is not insignificant). Considering the aggregate volume of interstate commerce affected in this case, I find it is not insubstantial."

(Footnotes omitted.)

It is not possible to reconcile the foregoing cases with the Ninth Circuit's conclusion that more than one line of

commerce is necessary to establish jurisdiction in hospital cases. Unfortunately, The Ninth Circuit's decision in the case below is typical of the difficulty the federal courts in this country have had in addressing the issue of Sherman Act jurisdiction for hospitals since this Court ruled in the landmark case of *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982), that hospitals and doctors are subject to the antitrust laws. It is respectfully submitted that it is high time for this Court to address definitively the issue of when a hospital's activity affects interstate commerce so that this highly unreliable series of doctor versus hospital cases, contradictory often within a single circuit and frequently contradictory circuit to circuit, can, once and for all, be reconciled.

II.

The District Court's Refusal To Permit Discovery As To The Level Of Out Of State Purchases Of Supplies And Equipment And Its Refusal To Permit Discovery As To The Actual Volume Of Out Of State Patients Resulted In An Improper Grant Of Summary Judgment. The Ninth Circuit's Decision To Affirm The District Court's Action Is An Error Of Law, And In Conflict With The Decisions Of This Court And Other Circuits

The facts in this case are significantly in dispute. Particularly in dispute is the level of out of state purchase of supplies and equipment and the level of treatment of out of state patients.

Respondents introduced declarations in support of their motion for summary judgment below stating that equipment and supplies are purchased predominately within the State of California. However, petitioners believe that the test for determining whether the goods or

funds enter into interstate commerce is not where the retailer or even the distributor is located, but rather where the manufacturer or supplier is located. *See Mascaro v. O'Hara*, 565 F.2d 264 (3rd Cir. 1977) ("The defendants' contention that local purchases do not affect the jurisdictional question is based on the 'coming to rest' doctrine — that goods which have come into possession of a local retailer for resale have left the stream of interstate commerce. The theory may have validity in determining whether the commerce clause precludes state taxation or regulation of interstate commerce (citation omitted) but it has no force in determining whether the Sherman Act's commerce requirement is satisfied") *See* also *Katzenbach v. McClung*, 379 U.S. 294, 302 (1964). Similarly, respondents provided an affidavit regarding out of state patients that contained no information for 1984 or 1985 and the clever statement that revenue for out of state patients equaled "zero percent" for 1986. Of course, with the use of "zero percent" respondents can avoid disclosing the presence of out of state patients to the extent of $25,000-50,000 in revenue per year before reaching a 1% level. Notwithstanding the absence of reliable evidence, the Ninth Circuit determined that there were "no patients" from out of state and further stated that it did not care whether there were out of state supplies purchased or even out of state patients if the number were small.

Apparently feeling that a rural hospital has no business invoking the jurisdiction of the Sherman Act, however many millions of dollars of interstate funds it receives, the Ninth Circuit upheld the District Court's granting of summary judgment despite the fact that further discovery was necessary in order to determine the actual nature and scope of the interstate commerce impact this hospital actually has. Although summary judgment may be "possible" under such circumstances (*See The Loan Store, Inc. v.*

Independent Food Stamps Associates, 671 F.Supp. 844 (D. C. Mass. 1987)), "where 'the proof is largely in the hands of the alleged conspirators,' dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *See Hospital Building Co. v. Rex Hospital Trustees* 425 U.S. 738, 746 (1976). As this Court has further stated, "this rule applies with no less force to a Sherman Act claim, where one of the requisites of a cause of action is the existence of a demonstrable nexus between the defendants' activity and interstate commerce." *See McLain v. Real Estate Board of New Orleans,* 444 U.S. 232, 246 (1980).[2]

It appears that the courts below have exercised their discretion to grant summary judgment in this case, notwithstanding the fact that the hospital, in one line of commerce (its receipt of revenues from out of state sources) has far exceeded other cases in which jurisdiction has been found to be appropriate, simply because the respondent here is a rural hospital. No clearer example of that can be found than in the Ninth Circuit's opinion at footnote 4 in which that Court, noting the absence of discovery to sustain the precise amount of hospital purchases from out of state, stated, "we do not feel that further discovery on this point *could produce evidence that would change our conclusion* that this rural California hospital's activities do not affect any aspect of interstate commerce sufficient to trigger Sherman Act jurisdiction." (Emphasis supplied)

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[2]In general, subject matter jurisdiction, particularly in antitrust cases, has not been found normally susceptible to resolution by way of a motion for summary judgment. See *Fortner Enterprises, Inc. v. U.S. Steel Corp.,* 394 U.S. 495 (1969); *Capitol Industries EMI, Inc. v. Bennett,* 681 F.2d 1107 (9th Cir.) *cert den.,* 103 S.Ct. 570 (1982).

Petitioners' counsel has not found case law to support the Ninth Circuit's apparent statement of law that courts may ignore possible elements of interstate commerce simply because they find that a business is rural and not located near state borders of a major metropolitan area. Additionally, notwithstanding Congress' recognition of the nationwide impact of local hospital activities in enacting the "Health Care Quality of Improvement Act of 1986 (P.L. 99-660, 42 U.S.C. Sections 12001-12032) and the Third Circuit's decision in *Doctors' Inc. v. Blue Cross of Greater Philadelphia,* 490 F.2d 48 (3rd Cir. 1973) that $200,000 per year of interstate supplies in *one* line of commerce is sufficient for Sherman Act jurisdiction, the Ninth Circuit has enacted its apparent rule that otherwise apparently sufficient volume of interstate commerce found in only a single line is not sufficient to confer jurisdiction of courts in that circuit.

The enactment of this apparent rule by the Ninth Circuit is in conflict with decisions of this Court, together with decisions of other circuits. In addition, the decision of the District Court and the Ninth Circuit to grant summary judgment which in effect dismisses a Sherman Act claim without permitting the petitioner to conduct the discovery necessary to demonstrate impact on interstate commerce in other lines of commerce (out of state supplies and out of state patients) raises an issue of nationwide importance as to the availabiltiy of jurisdiction of the federal courts to physicians who practice at hospitals other than those near state lines or located in a major urban area.

Therefore this petitioner presents this Court with a novel question of whether the rural nature of a hospital can, as it seems to have in this case, *standing alone*,

disqualify it from being subject to federal Sherman Act jurisdiction.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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D.C. No. CV-86-5790-JPV

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WINSTON A. MITCHELL, M.D.;
WINSTON A. MITCHELL, M.D., INC.,
Plaintiffs-Appellants,
v.
FRANK R. HOWARD MEMORIAL HOSPITAL;
ROBERT HARRAH; STEVEN WENTWORTH, M.D.,
Defendants-Appellees.

OPINION

Appeal from the United States District Court
for the Northern District of California
John P. Vukasin, Jr., District Judge, Presiding

Argued and Submitted
June 15, 1988 — San Francisco, California

Filed August 9, 1988

Before: Alfred T. Goodwin, Chief Judge,
Herbert Y. C. Choy, and William A. Norris,
Circuit Judges.

Opinion by Judge Norris

SUMMARY

Antitrust/Courts and Procedure

Appeal from district court grant of summary judgment for defendant. The court held that the plaintiff failed to

show that the hospital's activities had a substantial effect on interstate commerce.

Frank R. Howard Memorial Hospital terminated Dr. Winston Mitchell's oral contract to provide radiology services and hired another radiologist under an exclusive contract. Dr. Mitchell brought suit, alleging violation of the Sherman Act and Title VII because he is a Mormon. The district court entered summary judgment for the hospital on all counts.

[1] Affirming this part of the lower court ruling, the court concluded that the facts do not amount to a showing that as a matter of practical economics, the hospital's activities have a substantial effect on any interstate commerce. [2] The court held that as a matter of practical economics, Dr. Mitchell failed to make a sufficient showing of effect on interstate commerce to establish Sherman Act jurisdiction. [3] However, the district court erred in rejecting as legally insufficient Dr. Mitchell's allegations that he was an employee of hospital for the purposes of Title VII. [4] The court inferred from the facts alleged that the hospital controlled the "means and manner" of Dr. Mitchell's performance. Because this was not a situation in which it appeared beyond doubt that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief, the court reversed the dismissal of his Title VII claim.

COUNSEL

Arthur R. Chenen, Hirschtick, Chenen, Lemon & Curtis, Los Angeles, California, for the plaintiffs-appellants.

Robert L. Rusky, Hanson, Bridgett, Marcus, Vlahos & Rudy, San Francisco, California; Theodore A. Kolb, Sulli-

van, Roche & Johnson, San Francisco, California, for the defendants-appellees.

OPINION

NORRIS, Circuit Judge:

From July 1980 until August 31, 1985, appellant Winston A. Mitchell served under oral contract as the radiologist for appellee Howard Memorial Hospital ("the Hospital"), a 38-bed facility that is the only hospital in the rural town of Willits, Mendocino County, California (pop. 4200). After the Hospital terminated its agreement with Dr. Mitchell and entered into an exclusive contract for hospital-based radiology services with Dr. Steven Wentworth, Dr. Mitchell sued in federal district court claiming that the exclusive arrangement between Howard Memorial Hospital and Dr. Wentworth violated the Sherman Act. He also claims that the Hospital violated Title VII by discriminating against him because he is Mormon. Dr. Mitchell also pleaded a number of pendent state claims. The district court entered summary judgment for the Hospital on the antitrust claims on the ground that its activities did not, as a matter of law, have sufficient impact on interstate commerce to create jurisdiction under the Sherman Act. The district court also granted defendants' motion to dismiss the Title VII counts on the ground that Dr. Mitchell was not engaged in any employment relationships which are protected by Title VII. Finally, the court dismissed the pendent claims and entered judgment for the defendants. Our jurisdiction rests on 28 U.S.C. § 1291.

I

Dr. Mitchell argues that because the Hospital receives a substantial portion of its $5,000,000 annual revenues from out-of-state public and private insurance programs, because the Hospital purchases an unknown amount of medical supplies from out-of-state sources, and because the radiology department alone generates over $600,000 a year in revenue, the Hospital's activities, although local in nature, substantially affect interstate commerce. We review a summary judgment de novo. *Hall v. State of Hawaii,* 791 F.2d 759, 761 (9th Cir. 1986).

In *McLain v. Real Estate Bd.,* 444 U.S. 232 (1980), the Supreme Court held that to establish jurisdiction under the Sherman Act a plaintiff must show either "that the defendants' activity is itself in interstate commerce or, if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce." *Id.,* 444 U.S. at 242. As the Ninth Circuit has interpreted *McLain,* to establish jurisdiction under the Sherman Act, Dr. Mitchell is required to identify a relevant aspect of interstate commerce and then show "as a matter of practical economics" that the Hospital's activities have a "not insubstantial effect on the interstate commerce involved." *Palmer v. Roosevelt Lake Log Owners Ass'n, Inc.,* 651 F.2d 1289, 1291 (9th Cir. 1981).[1]

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[1]Appellees argue that *McLain* requires that only the Hospital's 'infected' activities, i.e., those of the radiology department, be considered for the purposes of Sherman Act jurisdiction. Dr. Mitchell, on the other hand, pointing to *Western Waste Serv. Systems v. Universal Waste Control,* 616 F.2d 1094, 1097 (9th Cir.), *cert. denied,* 449 U.S. 869 (1980), argues that the Ninth Circuit has adopted a "general business" activities test which requires examination of all of the Hospital's business activities. We assume, without deciding, that all "general business" activities of the Hospital are relevant to our

We agree with the district court that Dr. Mitchell has failed to show a not insubstantial effect on any appreciable activity in interstate commerce.[2] Although the Supreme Court has recognized that the receipt of insurance payments and the purchase of hospital supplies from out-of-state sources are relevant to the determination of whether a hospital's activities substantially affect interstate commerce, *see Hospital Building Co. v. Rex Hosp. Trustees,* 425 U.S. 738, 744 (1976), as the district court observed, "determinations of [Sherman Act] jurisdiction [in hospital cases] are based not merely upon revenue figures, but on a broad aggregate of factors including proximity of the facility to regional centers of commerce or to other states, treatment of significant numbers of out-of-state patients, purchase of equipment and supplies from interstate sources and interstate transfer of payment for patient care." Order Granting Plaintiff's Motion for Reconsideration and Granting Defendants' Motion for Summary Judgment. [Excerpt of Record, Tab No. 43, at 3.]

[1] We agree with the district court that these factors weigh against finding Sherman Act jurisdiction here. The small defendant hospital is located in a remote area of northern California over 150 miles from either the Oregon or Nevada borders and over 100 miles from the nearest significant urban center, San Francisco. According to

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inquiry, including those outside the radiology department. Because we believe the district court's summary judgment was proper under either theory, we express no view at this time as to the state of Ninth Circuit law on this point.

[2]The two relevant aspects of interstate commerce that Dr. Mitchell has identified are the fields of health insurance and medical supplies. For the reasons discussed below, we do not believe that either of these areas is significantly enough affected by the Hospital's activities to support Sherman Act jurisdiction.

the uncontroverted evidence in the record, the Hospital has not provided medical services for even one out-of-state patient at least since 1983.[3] The mere fact that this small hospital receives some out-of-state insurance payments and may have purchased some supplies from out-of-state sources does not amount to a showing that as a matter of practical economics the hospital's activities have a not insubstantial effect on any interstate commerce.[4]

As the decisions of other courts make clear, whether a hospital's activities sufficiently affect interstate commerce to create Sherman Act jurisdiction is a highly fact- based question calling for common sense judgment. Dr. Mitchell cites several hospital cases in which courts have found a sufficient impact on interstate commerce to support Sherman Act jurisdiction. In *Mishler v. St. Anthony's Hosp. Systems,* 694 F.2d 1225 (10th Cir. 1981), for example, the Tenth Circuit reversed the district court's dismissal of the complaint because the plaintiff doctor alleged that the hospital received substantial revenues from out- of-state insurance, that the hospital received medical supplies from out-of-state, and that the hospital provided services to out-of-state patients. *Id.* at 1227. Similarly, in *Tarleton*

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[3]According to the uncontroverted affidavit of the Hospital's administrator, Howard Memorial has serviced no out-of-state patients since 1983 and its radiology department, the focal point of Dr. Mitchell's claim, has purchased no equipment or supplies from out-of-state sources. Excerpt of Record at Tab. No. 17.

[4]Dr. Mitchell alleges that the hospital purchases an unknown quantity of supplies out of state, but argues that without further discovery he cannot ascertain the precise amount. We do not feel that further discovery on this point could produce evidence that would change our conclusion that this rural California hospital's activities do not affect any aspect of interstate commerce sufficient to trigger Sherman Act jurisdiction.

v. Meharry Medical College, 717 F.2d 1523 (6th Cir. 1983), the Sixth Circuit found jurisdiction where the defendant medical college provided services for a substantial number of out-of-state patients, actively recruited its students and faculty from other states, obtained significant amounts of medical supplies from out-of-state, and received both private and public funding from out-of-state. *See also Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715 (10th Cir. 1980) (en banc) (same facts as *Mishler*).[5]

Other courts, however, have held that Sherman Act jurisdiction does not extend to claims against hospital defendants in somewhat similar circumstances. In *Doe v. St. Joseph's Hosp.*, 788 F.2d 411 (7th Cir. 1986), for example, the Seventh Circuit held that allegations that the defendant hospital had purchased medical supplies out of state, received reimbursement from out-of-state insurance programs, treated out-of-state patients, and shared medical information and training across state lines were legally insufficient to establish Sherman Act jurisdiction. *ID*, at 417. And in a case relatively close to the one at hand, the Eighth Circuit upheld the dismissal of a Sherman Act claim in which the plaintiff doctor alleged that the defendant hospital purchased supplies from out-of-state sources and that 88% of the defendant hospital's bills were paid by third-party payors, 33% of

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[5]Although not relied on by Dr. Mitchell, in *Hospital Building Co. v. Rex Hospital Trustees*, 425 U.S. 738 (1976), the Supreme Court reversed the dismissal of a Sherman Act claim against a hospital which allegedly purchased 80% of its supplies out of state, serviced out-of-state patients, received insurance payments from out-of-state companies, and was involved in a multi-million dollar expansion financed in large part by loans from out-of-state sources.

which were Medicare payments. *Hayden v. Bracy*, 744 F.2d 1338, 1342-43 (8th Cir. 1984).

[2] Our canvassing of the hospital cases supports our judgment that Dr. Mitchell has failed to make a showing sufficient to establish Sherman Act jurisdiction.[6] The cases in which courts have found Sherman Act jurisdiction involve hospitals whose activities appear to have had a much greater effect on interstate commerce than the activities of the hospital in this case. In sum, we hold that "as a matter of practical economics" Dr. Mitchell has failed to make a sufficient showing of effect on interstate commerce to establish Sherman Act jurisdiction.

II

Dr. Mitchell also appeals the district court's dismissal of his Title VII counts for failure to state a claim. The district court dismissed the Title VII counts with prejudice on the ground that Dr. Mitchell, as an independent contractor with the Hospital, did not have an employment relationship with either the Hospital or with his patients which is protected by Title VII. We review de novo dismissals under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. *Guillory v. County of Orange*, 731 F.2d 1379, 1381 (9th Cir. 1984).

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[6]Dr. Mitchell's reliance on *Palmer v. Roosevelt Log Owners Ass'n*, 651 F.2d 1289 (9th Cir. 1981), a non-hospital case, is also misplaced. In *Palmer*, plaintiff alleged that the defendants had conspired to monopolize trade in the retrieval and sale of abandoned logs on Roosevelt Lake. This court found jurisdiction, despite the relatively small dollar amounts involved, because the alleged restraint would "unreasonably burden [ ] the free and uninterrupted flow" of Washington lumber products out-of-state. *Id.* at 1292.

A

Dr. Mitchell argues first that the district court erred in rejecting his factual allegations that for some purposes he was an employee of the Hospital, not an independent contractor.[7] He contends that the facts alleged in his Title VII counts are sufficient to withstand a motion to dismiss for failure to state a claim. We agree.

[3] It is axiomatic that in considering a motion to dismiss under Rule 12(b)(6) the district court must accept as true all facts as alleged by the plaintiff. *Hospital Building Co.*, 425 U.S. at 740. Moreover, a plaintiff's claims should not be dismissed on the pleadings "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). We feel that Dr. Mitchell's complaint satisfies this standard and that the district court erred in rejecting as legally insufficient Dr. Mitchell's allegations that, for the purposes of Title VII, he was an employee of defendant Hospital.

As we noted in *Lutcher v. Musicians Union Local 47*, 633 F.2d 880 (9th Cir. 1980), determining whether a relation-

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[7]The district court, apparently relying on Dr. Mitchell's own use of the term "independent contractor" to describe his relationship with the hospital, First Amended Complaint at ¶ 61, "reject[ed] plaintiff's assertions that he was, for some purposes, an employee of the hospital. . . ." Order Granting Defendants' Motion for Summary Judgment on Counts 1 and 2 and Motion to Dismiss Counts 3-15, at 3. Dr. Mitchell points out, however, that his self-characterization as an independent contractor does not appear in the portion of his complaint which alleges Title VII violations. Clearly, such an inconsistency does not render the pleadings inadequate. Fed.R.Civ.P. 8(e)(2). *See also* C. Wright and A. Miller, Federal Practice and Procedure: Civ. ¶ 1283 (1969).

ship is one of employment, in which case Title VII protections apply, or rather one of independent contractual affiliation, in which case they do not, requires a fact-specific inquiry which "depends upon the economic realities of the situation." *Id.* at 883. This is not to say that there are no guidelines to aid courts in this inquiry. In *Lutcher* itself we identified a number of factors that should be considered when determining whether an employment relationship existed, the primary one being the extent to which the "employer" has a right to control the means and manner of the worker's performance. *Id.* Other factors include: whether the "employer" or the individual in question furnishes the equipment used and the place of work; the length of time during which the individual has worked; the method of payment; and whether the work is an integral part of the business of the "employer." *Id.* at n.5.

[4] When these factors are examined in light of Dr. Mitchell's factual allegations, it becomes clear that the pleadings are not insufficient on their face. Dr. Mitchell alleges that all radiology services were provided at the Hospital, and that at least some of the equipment used was provided by the Hospital. First Amended Complaint at ¶ 30. Moreover, and perhaps more important, Dr. Mitchell alleges that his agreement with the Hospital provided that he would treat Hospital patients; he does not allege that he used the Hsopital's facilities to treat his own patients, *Id.* In addition, Dr. Mitchell alleges that his agreement with the Hospital provided that he would receive in compensation for his services forty percent of the gross billings of the radiology department during the time the agreement was in effect. *Id.* Although it is not entirely clear that this method of payment tends to bolster Dr. Mitchell's assertion that, for Title VII purposes, he was an employee of the Hospital, the fact that

Dr. Mitchell was paid by the Hospital rather than by the patients he treated may very well support his position. In general, it may be inferred, from the facts alleged, that the Hospital enjoyed considerable control over "the means and manner" of Dr. Mitchell's performance. Thus, this is not a situation in which "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Accordingly, we reverse the district court's dismissal of his Title VII counts.

B

Dr. Mitchell also argues that even if he did not enjoy an employment relationship with the Hospital which was protected by Title VII, he nonetheless stated a Title VII claim by alleging that the Hospital's actions interfered with his employment opportunities with his patients. On the basis of the facts alleged, we cannot agree.

In *Lutcher*, we recognized that a Title VII plaintiff need not aver the existence of a protected employment relationship with the defendant, but rather could state a claim under Title VII by averring that a defendant's actions interfered "with an individual's employment opportunities with another employer." 633 F.2d at 883 n.3.[8] We also noted in *Lutcher*, however, that "there must be some connection with an employment relationship for Title VII protections to apply." *Id.* at 883. Here, Dr. Mitchell has not alleged any facts which would support a finding that his relationships with his patients or prospective patients are employment relationships for the purposes of Title VII. The *Lutcher* factors discussed above strongly suggest

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[8]This view is consistent with the positions of at least two other circuits. *See Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973); *Doe*, 788 F.2d 411.

that the traditional physician/patient relationship is not one of employee/employer and as such is not protected under Title VII. Because Dr. Mitchell has not averred that his relationships with his patients in any way diverge from the traditional physician/patient relationship, we hold that as a matter of law his allegations that the Hospital interfered with his relationships with his patients fail to state a claim for relief under Title VII. *See Beverley v. Douglas*, 591 F.Supp. 1321, 1328 (S.D.N.Y. 1984) (arriving at same conclusion); *but see Doe*, 788 F.2d at 425 (physician/patient relationship may be covered by Title VII).

C

Finally, Dr. Mitchell argues that the Hospital interferred with his employment relationship with the professional corporation of which he is the sole shareholder. We reject this argument because we believe that the relationship between an individual and his wholly owned professional corporation is not an employment relationship that Congress intended to protect under Title VII. *Gomez v. Alexian Bros. Hosp. of San Jose*, 698 F.2d 1019 (9th Cir. 1983), upon which Dr. Mitchell relies, is clearly distinguishable. *Gomez* involved a corporation that employed a number of doctors who rendered medical services as part of the corporation's group medical practice. *Id.* at 1020. In contrast, Dr. Mitchell is both the sole shareholder and sole employee of his professional corporation.

The parties shall bear their own costs on this appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

NO. C-86-5790 JPV

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WINSTON A. MITCHELL M.D., and
WINSTON A. MITCHELL M.D., INC.
Plaintiffs,
v.
FRANK R. HOWARD MEMORIAL HOSPITAL,
ROBERT HARRAH and STEVEN WENTWORTH, M.D.,
Defendants.

FILED APR 13 1987, WILLIAM L. WHITTAKER, CLERK
ENTERED IN CIVIL DOCKET 4/15 1987

ORDER GRANTING PLAINTIFFS' MOTION FOR RECONSIDERATION AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On April 2, 1987 this matter came before the Court on plaintiffs' motion pursuant to Rules 59 and 60 of the Federal Rules of Civil Procedure for reconsideration of and rehearing on the March 13, 1987 Order Granting Summary Judgment on counts 1 and 2 of plaintiffs' complaint. The motion was deemed submitted on the written pleadings and no appearance by counsel was entered.

Having reviewed the written briefs and other documentation which accompanied plaintiffs' motions, defendants' opposition and plaintiffs' reply, the Court makes the following findings:

(1) Plaintiffs' failure to plead facts regarding the Hospital's impact on interstate commerce, which are already at their disposal, was the result of a combination of neglect and miscalculation of the importance of such facts on the part of plaintiffs' counsel. In the interest of deciding this case on its merits, the Court finds that plaintiffs' counsel's carelessness in acquainting himself with the facts of the case were the result of excusable neglect.

(2) As a matter of law, neither the Hospital's general business activities nor its provision of radiology services which is allegedly "infected" with illegal activity have the substantial effect on interstate commerce necessary to invoke jurisdiction under the Sherman Act. *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980). Therefore, plaintiffs state no claim for violation of federal antitrust law.

Plaintiffs' claim for antitrust jurisdiction rests essentially upon two allegations: that the Hospital and the radiology department earn $5,000,000 and $600,000 in gross annual revenue respectively, and that approximately 30-50% of revenues for patient care travel in interstate commerce. Additionally, the Hospital and the radiology department purchase equipment and supplies from local dealers some of which, planitiffs claim, may be manufactured out of state.

While it is true that entities generating revenues far less than those generated by the Hospital or the radiology department in question have been found to have substantial impact on commerce, such determinations of jurisdiction are based not merely upon revenue figures, but on a broad aggregate of factors including proximity of the facility to regional centers of commerce or to other states, treatment of significant numbers of out-of-state patients,

purchase of equipment and supplies from interstate sources and interstate transfer of payment for patient care. Plaintiffs' reliance on interstate transfer of payments for patient care is an attempt to establish jurisdiction by reference to just one of the many factors to be considered in the jurisdictional determination. Furthermore, plaintiffs' emphasis on the Hospital's gross income in effect asks this Court to establish jurisdiction by creating a presumption at law that such revenues must necessarily have substantial impact upon interstate commerce. No such presumption presently exists, and the Court declines to expand anti-trust jurisdiction by creating one.

For the foregoing reasons plaintiffs' motion for reconsideration is GRANTED. Upon reconsideration defendants' motion for summary judgment is again GRANTED. IT IS SO ORDERED.

Date: April 13, 1987

J.P. VUKASIN, JR., JUDGE
UNITED STATES DISTRICT
COURT

NOTICE OF ORDER GRANTING PLAINTIFFS' MOTION FOR RECONSIDERATION AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(PROOF OF SERVICE BY MAIL-1013a, -2015.5 CCP)

I, the undersigned, hereby certify under penalty of perjury that I am over the age of 18 years and not a party to the within action; that my business address is 333 Market Street, San Francisco, California and that on this date I placed a true copy of the foregoing document in an envelope, and caused it to be sealed and deposited in the U.S. mail at San Francisco, California, with postage fully prepaid thereon, addressed in the manner set forth below.

Dated at San Francisco, Calif. on April 16, 1987.

RICHARD L. POOLE

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles, I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On November 28, 1988, I served the within Petition for Writ of Certiorari in re: "Winston A. Mitchell, M.D. vs. Frank R. Howard Memorial Hospital" in the United States Supreme Court, October Term 1988, No. .....;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, adressed as follows:

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Vlahos & Rudy
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All Parties required to be served have been served.

I certify, under penalty of perjury, that the foregoing is true and correct.

Executed on November 28, 1988, at Los Angeles, California

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